

**Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 18 December 2006**

**BALCA Case No.: 2006-INA-00057**  
ETA Case No.: P-05115-72316

*In the Matter of:*

**H.R. SHAIKH & COMPANY, LLP,**  
*Employer,*

*on behalf of*

**KHURRAM BUTT,**  
*Alien.*

Certifying Officer: Jenny Elser  
Dallas, Texas

Appearance: Farrukh Seyar  
Partner  
*Pro se for the Employer and the Alien*

Before: **Burke, Chapman and Vittone**  
Administrative Law Judges

**JOHN M. VITTON**  
Chief Administrative Law Judge

**DECISION AND ORDER**

This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the

Code of Federal Regulations ("C.F.R.").<sup>1</sup> We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

On April 2, 2001, the Employer – a C.P.A. firm – filed an application for labor certification to enable the Alien to fill the position of "Accountant." (AF 6). The Employer filed a recruitment report with the Texas Workforce Commission ("TWC") on July 21, 2003. (AF 56). When the TWC transmitted the application to the federal CO, it noted that 126 applicants had been referred to the Employer, but that 15 of the applicants were not documented in the Employer's recruitment report. (AF 52-55). The CO issued a Notice of Findings on April 7, 2006 proposing to deny the application based on the unlawful rejection of the 15 applicants. (AF 41-44). The CO later accepted the Employer's rebuttal in regard to three of the applicants. In regard to the remaining 12 applicants, the Employer's rebuttal stated, in pertinent part:

The second contention is that the certifying officer has identified 12 applicants who were not included in the employers [sic] Results of Recruitment statement. Please note that we received two types of applicants' lists from the Texas Workforce Commission (TWC). The first type of list stated "The Texas Workforce Commission has forwarded the following resume(s) in response to the advertisement."

All of the names on this list with resumes were contacted and these were a part of the Results of Recruitment Report.

The second type of list stated "The Texas Workforce Commission has referred the applicants listed below". These were applicants whose resumes were not sent to us. From this list a majority of individuals sent us their applications/resumes. We processed these to establish that they

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1 This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

pre-qualify in terms of educational and working experience requirements. These applicants were then contacted for interviews. All those who chose not to submit their applications/resumes were considered to be not interested in the job opening.

All 12 of your contention fell under this category. They did neither forward their resumes to you nor to us. This is a professional position requiring an Associate's Degree and three years of experience. Yet they did not even forward their resumes to us.

We understand from "the TWC has referred" to indicate that TWC has referred our Company to these individuals indicating that a suitable job opening exists and these individuals need to formally apply for the position, if they are interested. By not applying they have demonstrated no interest in the job opening.

(AF 24-25).

The CO issued a Final Determination on July 19, 2006 denying certification. (AF 15-17). The CO, assuming that the Employer had the addresses and telephone numbers of the 12 applicants, found that the Employer's failure to document contact of those applicants constituted a lack of good faith in recruitment.

## **DISCUSSION**

Clearly, the Final Determination missed the central point of the rebuttal – that TWC did not forward applications to the Employer for the 12 applicants at issue, but merely referred the applicants to the Employer with the expectation that those applicants would contact the Employer. We have reviewed the record, and find no evidence to suggest that the Employer rebuttal was not accurate in this respect. Thus, we reverse the CO's denial of labor certification insofar as it was based on the failure to contact these 12 applicants.

Following our review of the Appeal File, however, we are concerned about whether the Employer in this case recruited in good faith. There were – depending on

whether you use the Employer's count or the TWC's count – 123 to 126 applicants for the position. Our review of the resumes of record suggests that some of the applicants were not qualified, but that many may well have met the Employer's stated job requirements (an Associate's Degree in Accounting and three years of experience as an accountant). Some of the applicants should have been very well qualified. The recruitment report is often vague and summary as to the reasons for rejecting the applicants who were interviewed. Most were rejected for lack of tax experience.

The Employer's rebuttal documentation makes it clear that applicants were asked to "answer 12 basic questions related to Accounting & Tax." (AF 23). Reviewing the questionnaires provided in rebuttal, it is apparent that some the questions may have been legitimate tests of basic accounting knowledge. Others, and particularly questions related to taxation, seem to have been designed to ensure that most applicants would fail. For example, the Employer asked: "What is the annual maximum amount for taxable wages in Texas for Texas Workforce Commission?" (AF 26). We find this question problematic because (1) the Employer's job description did not state that an applicant had to be an expert in Texas tax law, (2) even an expert may not have committed to memory this amount, and (3) the question is vague and practically unintelligible.

Another tax question was "What is the Maximum wage subject to Social Security and Medicare Taxes, for 2002?" (AF 26). Although an accountant should probably be expected to know that there is no maximum to trigger a cut-off of Medicare withholdings, it is not credible to believe that even a well-qualified and experienced accountant would have necessarily committed the maximum wage for Social Security withholding for a particular year to memory, or that an Employer would reject an applicant for not being able to recite this amount by rote.

These types of questions beg the question of whether, when the Employer stated in its recruitment report that certain applicants lacked required tax experience, the Employer was basing that assessment on applicants' inability to answer these types of

questions.<sup>2</sup>

Moreover, the record contains no details about how the questions were asked. Were the applicants asked the questions verbally and then their answers transcribed by the interviewer, or were they given the questions and asked to write down their answers? Is this a standard accountancy test? How specifically did each question relate to the core job duties?<sup>3</sup> How did each question specifically and objectively relate to the Employer's clients and needs? Was this test given to the Alien prior to hire? Was it administered to other job applicants for accounting positions both prior to and subsequent to the instant labor certification application? *See Mitco*, 1990-INA-295 (Sept. 11, 1991) (although an employer may, in some circumstances use a test or questionnaire to ascertain the extent of claimed experience, it may not be used as a means of discriminating against U.S. workers).

The Board has recognized that a pre-employment test which is designed to aid an employer in the subjective determination of whether an applicant is able to perform the core job duties may be a valid interview tool. It has also cautioned, however, that "such a subjective determination, because of its potential for abuse, is suspect and must be supported by objective, detailed facts which are sufficient to provide an objective, detailed basis for concluding the applicant could not perform the core job duties." *Sentient Systems, Inc.*, 1994-INA-519 (Jan. 23, 1996), citing *Lee & Family leather Fashions, Inc.*, 1993-INA-50 (Dec. 21, 1994).

Accordingly, we remand this case to give the CO an opportunity to issue a NOF addressing the matters raised in this Decision and Order. *See Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (en banc) (Board may direct the CO on remand to consider an issue not previously considered in the original NOF or the Final Determination); *Melillo Maintenance, Inc.*, 1989-INA-127 (Sept. 20, 1990) (en banc).

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<sup>2</sup> The rebuttal, for example, indicates that Mr. Kmiec was found not to have basic tax knowledge based on his inability to answer these questions. (AF 24).

<sup>3</sup> For example, what is the relevancy of the question "What do you know about National Research Program?" Is this something accountants need to know to perform their core duties? How specifically?

## **ORDER**

The Certifying Officer's Final Determination is hereby **VACATED** and this matter **REMANDED** for further proceedings consistent with the above.

For the panel:

**A**

**JOHN M. VITTONE**

Chief Administrative Law Judge

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W.  
Suite 400 North  
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.